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No. 265

In the Supreme Court of the United States

OCTOBER TERM, 1946

FRANK A. CARDILLO, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

v.

LIBERTY MUTUAL INSURANCE COMPANY, E. C. ERNST, INC., AND VIRGINIA C. TICER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The District Court for the District of Columbia did not render an opinion. The opinion of the Court of Appeals for the District of Columbia (R. 59–62) is reported at 154 F. 2d 529.

JURISDICTION

The judgment of the Court of Appeals was entered on April 8, 1946 (R. 63). The petition for a writ of certiorari was filed on July 2, 1946, and was granted on October 14, 1946 (R. 65). The jurisdiction of this Court rests upon Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, upon review of an order of the Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act, as applied to the District of Columbia, awarding compensation to the widow of a deceased employee, the court below erred:

(a) in failing to accept as final the Deputy Commissioner's finding that the employee's injury arose out of and in the course of his employment; and

(b) in holding, as a matter of law, that an injury to an employee while traveling home from work is not an injury arising out of and in the course of his employment, where the employer has undertaken in the contract of employment to furnish "transportation" to and from work, but instead of providing transportation, compensates the employee for furnishing his own transportation, and hence has no "control" over the employee's "acts and movements" during the course of such transportation.

STATUTES INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. 1424; 33 U. S. C. 901 *et seq.*), and of the District of Columbia Workmen's Compensation Law (Act of May 17, 1928, 45 Stat. 600, D. C. Code, 1940, Title 36,

Chap. 5, § 1), are set forth in the Appendix, pp. 37–39.

STATEMENT

On December 13, 1944, respondents, E. C. Ernst, Inc., (the "employer") and Liberty Mutual Insurance Company (the "insurance carrier") instituted this action in the District Court of the United States for the District of Columbia to set aside an order issued by the petitioner under the District of Columbia Workmen's Compensation Law, awarding compensation to the claimant Virginia C. Ticer, a party hereto, as widow of Clarence H. Ticer, who had been employed by Ernst (R. 2–10).

The Deputy Commissioner's findings (R. 7–10) in support of his order may be summarized as follows: Ticer, a resident of the District of Columbia, had been employed since about 1934 as an electrician by E. C. Ernst, Inc., a contractor, engaged in electrical construction work in the District of Columbia and surrounding areas (R. 7–8).[1] In November 1940, the employer transferred Ticer from a construction project in the District of Columbia to a project at the Quantico Marine Base (R. 8). In the agreement between the electrical workers' union and the employer, it was provided that for all work outside the District of Columbia "Transportation and any necessary expense, such

[1] The Deputy Commissioner expressly found that "on the date of the injury the employer was carrying on employment in the District of Columbia as an electrical contractor * * * [and] maintained an office at 1622 Fourteenth Street, Northwest, Washington, District of Columbia" (R. 7).

as board and lodging, shall be furnished" by the employer (R. 8, 53). The sum of $2.00 per day was fixed by the parties to the agreement as transportation expense, and represented the approximate cost of travel from the District of Columbia to the Marine Base and return (R. 8). This amount was paid to Ticer in addition to the regular hourly rate of pay, and was in lieu of the employer's supplying transportation (R. 8). As the Quantico job site was several miles away from the bus or train terminal, it was necessary for Ticer and his co-workers to drive their own automobiles to and from work (R. 8). The employees formed a car pool, and each morning they started from their homes in their own automobiles to a designated meeting place at Roaches Run, Virginia, and then would proceed in one car to the job site (R. 8-9). The workers alternated in the use of the cars for that part of the trip, nonmembers of the car pool each paying the car owner $1.00 for the round trip (R. 9). The employer was aware of the means of transportation being used, and acquiesced therein (R. 9). On December 13, 1943, while Ticer and four coworkers were riding in his car (which he was driving) on a direct route from his place of employment to his home, an accident occurred near Fort Belvoir, Virginia, causing his death on December 17, 1943 (R. 7, 9).[2]

[2] A large stone, which came from under the rear wheel of a passing truck, crashed through the windshield of the car, struck Ticer on the head, and crushed his skull (R. 7).

At the hearing before the Deputy Commissioner on a claim for compensation by Ticer's widow, the insurance carrier contended that the Virginia Compensation Commission had sole jurisdiction over the claim, that the claimant was not a "dependent widow" within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, and that Ticer's injury "did not arise out of or in the course of employment" (R. 13–14). The Deputy Commissioner, however, ruled adversely to these contentions, and on July 21, 1944, issued an order awarding death benefits and funeral expenses to the claimant (R. 4, 10).

The employer and insurance carrier then filed their complaint (R. 2–6) in the District Court for review of the order, renewing their challenge to the Deputy Commissioner's jurisdiction, and alleging a want of substantial evidence to support the finding that Ticer's injury arose out of and in the course of his employment. Upon motions of the Deputy Commissioner and the claimant (R. 11–12), the District Court dismissed the complaint on the grounds that the Deputy Commissioner's findings were "supported by evidence in the record" and that the compensation order was "in all respects in accordance with law" (R. 12–13). On appeal, the Court of Appeals for the District of Columbia reversed, with Chief Justice Groner dissenting (R. 63). With-

out passing upon the jurisdiction of the Deputy Commissioner, the court held that Ticer's injury had not arisen out of and in the course of his employment, since "the control of the employer" over his "acts and movements" ended "with the close of the work day at Quantico," thereby terminating the master and servant relationship (R. 62).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia erred:

1. In holding as a matter of law that an employee's injury cannot arise out of and in the course of employment, if the injury occurs in circumstances where the employer lacks "control" over "the acts and movements of the employee."

2. In holding that Ticer's injury did not arise out of and in the course of his employment, and in refusing to accord finality to the Deputy Commissioner's finding in this regard.

3. In holding that the $2.00 transportation payment to Ticer was made pursuant to a "new contract" and not to the original employment contract.

4. In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT

I

The court below should have accorded finality to the Deputy Commissioner's finding that

Ticer's injury arose out of and in the course of his employment, for it is well settled that such a finding is conclusive if it is supported by evidence and has a reasonable basis in law. *Parker v. Motor Boat Sales, Inc.*, 314 U. S. 244; *Voehl v. Indemnity Insurance Co.*, 288 U. S. 162; *Davis v. Department of Labor*, 317 U. S. 249. The evidence showed that by a provision of the employment contract, in effect for some 15 years, the employer was required to furnish "transportation"; that this obligation was regularly discharged either by furnishing the transportation itself, or by paying the employee the cost of the transportation; and that the $2.00 per day had been paid by the employer in this case in lieu of providing transportation. The character of the employment was such, by reason of the location of the work, the hours of work, and the inadequacy of public transportation facilities, as to require as a practical matter that the employer make some arrangement for transportation if employees were to be obtained for the job.

In the light of all the circumstances, the Deputy Commissioner was justified in finding that Ticer's transportation to and from work was an incident of his employment, and that, for purposes of workmen's compensation, he was in the service of his employer while going to and from work. Even if "more than one possible conclusion could have been reached upon the evidence, we think it was clearly sufficient to support the Deputy

Commissioner's finding that [Ticer] was acting in the course of his employment." *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 246.

There was clearly a reasonable basis in law for the finding. The criteria applied were those enunciated in *Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162, which holds that whether the hazards of an employee's journey to and from work are hazards of the employment turns upon the nature and circumstances of the particular employment, and in a large measure depends upon the terms of the employment agreement, whether express or implied. Administrative disposition of "transportation" cases of this sort involves evaluation of the particular facts and circumstances, and so long as the Deputy Commissioner applies the correct standards of law, his determination should be judicially examined only to the extent of ascertaining whether it has support in the record.

The ruling by the court below that, as a matter of law, the award could be sustained only if the employer has "control" over "the acts and movements" of the employee during the transportation, is squarely in conflict with the *Voehl* decision. There the employee was driving his own automobile; the employer, in fact, had no control over his acts and movements. The inadequacy of the "control" test is also evidenced by the numerous instances in which compensation is awarded where there is no real or substantial control by the em-

ployer over the employee's movements or the means of transportation. "Control" is, at best, a vague and indefinite standard. If applied to the field of workmen's compensation, it would reintroduce the uncertainties that have long plagued the courts in applying the doctrine of *respondeat superior*, and would be inconsistent with the statutory policy of providing a "prompt" and "inexpensive" method for the disposal of workmen's compensation claims. *Crowell* v. *Benson*, 285 U. S. 22, 45–47. While some state authorities refer to the "control" test in some "transportation" cases, even there only lip service is frequently paid to the doctrine; and where, as here, there is an express agreement to provide transportation, the doctrine is ordinarily not applied to defeat the employee's right of recovery. In other jurisdictions, the "control" test is completely rejected.

II

The Deputy Commissioner's finding that he had jurisdiction—despite the length of time Ticer worked in Virginia and the occurrence of the injury there—followed the plain command of the statute that it "shall apply in respect to the injury or the death of an employee of an employer in the District of Columbia, irrespective of the place where the injury or death occurs". It was contended below that where the injury occurs outside the District, the Act can apply only if the employee spent more time working within the District than outside the District. But the record

does not show that this was true of Ticer, and even if it did, that would not bar jurisdiction. To do so would require a limitation on the unambiguous language of the statute. The extraterritorial provision in the Act is designed to cope with the special circumstances involved in providing adequate workmen's compensation for what is essentially a city-state. Application of that provision here raises no problem of due process or full faith and credit. The public interest which the District had in Ticer's employment is at least as strong as the interest which was held sufficient for California to award compensation in *Alaska Packers Association* v. *Industrial Commission*, 294 U. S. 532.

ARGUMENT

I

THE COURT BELOW SHOULD HAVE ACCEPTED AS FINAL THE DEPUTY COMMISSIONER'S FINDING THAT TICER'S INJURY AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT

Section 1 of the District of Columbia Workmen's Compensation Law provides in part that the "'Longshoremen's and Harbor Workers' Compensation Act' * * * shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs" (Appendix, p. 37). "Injury" is defined in the Longshoremen's Act, Section 2 (2), as "accidental injury or death arising out of and in the course of employ-

ment * * *" (Appendix, p. 37). Accordingly, a fundamental prerequisite to compensation under the District of Columbia Workmen's Compensation Law is a finding that the injury was one "arising out of and in the course of employment."[3]

In setting aside the Deputy Commissioner's finding (R. 9) that Ticer's injury arose out of and in the course of his employment, the court below failed to accord the finality which the statute attaches to that finding. Section 19 (a) of the Longshoremen's Act, which provides for the filing of a "claim for compensation," specifies that "the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim" (Appendix, p. 38). Section 21 (b) provides that compensation orders may be suspended or set aside through injunction proceedings instituted in the federal district courts "if not in accordance with law" (Appendix, p. 38). Under these sections, it is well-settled that the findings of the Deputy Commissioner are conclusive if they are supported by evidence and have a reasonable basis in law. *Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162, 166, 169; *Del Vecchio* v. *Bowers*, 296 U. S. 280, 287; *South Chicago Coal and Dock Co.* v. *Bassett*, 309 U. S. 251; *Parker* v. *Motor Boat*

[3] This is the classic phrase found, with few exceptions, in the various workmen's compensation laws of the states. See C. C. H. Workmen's Compensation Law Reporting Service (1946) Pars. 1004–1054; Dodd, *Administration of Workmen's Compensation* (1936), p. 681.

Sales, Inc., 314 U. S. 244; *Davis* v. *Department of Labor*, 317 U. S. 249, 256. The Deputy Commissioner is not limited to finding the basic or underlying facts; he may draw conclusions or inferences therefrom and if the facts permit "an inference either way" (*Del Vecchio* v. *Bowers*, *supra*, at p. 287), the Deputy Commissioner "alone is empowered to draw the inference; his decision as to the weight of the evidence may not be disturbed by the court" (*ibid.*). And these principles are applicable to the question whether a particular injury arose out of and in the course of employment (*Voehl* v. *Indemnity Insurance Co.*, *supra*, at p. 166; *Parker* v. *Motor Boat Sales, Inc.*, *supra*, at pp. 245–246; cf. *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131). The answer to this question must turn "upon the nature and circumstances of the particular employment" (*Voehl* v. *Indemnity Insurance Co.*, *supra*, at p. 169). The issue is one "in which particular facts and circumstances are vital elements," and the Deputy Commissioner's conclusion will be rejected by this Court "only in cases of apparent error." Cf. *Davis* v. *Department of Labor*, *supra*, at pp. 256–257.

The court below did not refer to these limitations on its power to review. The court embarked upon an independent appraisal of the evidence and reached its own determination as to whether Ticer's injury arose out of and in

the course of his employment. In so doing, we believe, the court was clearly in error. There was substantial evidence and a reasonable basis in law for the conclusion that Ticer's injury arose out of and in the course of his employment, and the Deputy Commissioner's finding should therefore have been treated as conclusive. Cf. *Unemployment Compensation Comm. of Alaska v. Aragan*, No. 25, this Term, decided December 9, 1946.

A. THE DEPUTY COMMISSIONER'S FINDING HAD A REASONABLE BASIS IN LAW

The Deputy Commissioner's finding (R. 9) that Ticer's injury arose out of and in the course of his employment had a reasonable basis in law, and in no way embodied novel principles. The relevant criteria to be applied in "transportation" cases, and which were applied by the Deputy Commissioner here, were those enunciated over a decade ago in *Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162, where this Court sustained an award of compensation by the Deputy Commissioner, even though the injury occurred while the employee was driving his own automobile and while he was on his way to the employer's place of business. This Court there observed (288 U. S. at 169–170):

> * * * The general rule is that injuries sustained by employees when going to or returning from their regular place

> of work are not deemed to arise out of and in the course of their employment. [Citing cases] Ordinarily the hazards they encounter in such journeys are not incident to the employer's business. But this general rule is subject to exceptions which depend upon the nature and circumstances of the particular employment. "No exact formula can be laid down which will automatically solve every case." *Cudahy Packing Co.* v. *Parramore*, 263 U. S. 418, 424. See, also, *Bountiful Brick Co.* v. *Giles*, 276 U. S. 154, 158. While service on regular hours at a stated place generally begins at that place, there is always room for agreement by which the service may be taken to begin earlier or elsewhere. Service in extra hours or on special errands has an element of distinction which the employer may recognize by agreeing that such service shall commence when the employee leaves his home on the duty assigned to him and shall continue until his return. And agreement to that effect may be either express or be shown by the course of business. In such case the hazards of the journey may properly be regarded as hazards of the service and hence within the purview of the Compensation Act. [Citing cases]

Thus, under the *Voehl* case, whether the hazards of an employee's journey to and from work are hazards of the employment turns upon the nature and circumstances of the particular employment,

and in a large measure depends upon the terms of the employment, whether they be embodied in an express agreement or based upon a course of business. The proper disposition of "transportation" cases of this sort involves, not reference to rules of law, but rather evaluation of the particular facts and circumstances—and so long as the Deputy Commissioner follows applicable legal standards, his determination will not be reexamined by the courts if it has support in the evidence.[4] Indeed, as has already been noted,

[4] Awards of compensation in the following "transportation" situations have generally been sustained: (1) where the employment requires the employee to travel on the highways—*Bennett* v. *Marine Works, Inc.*, 273 N. Y. 429, 7 N. E. 2d 847 (travelling salesman); (2) where the employer furnishes transportation to and from work, in his own vehicle (*Mullen* v. *Delaware, L. & W. R.*, 151 Pa. Super. 410, 30 A. 2d 141; *California Casualty Indemnity Exchange* v. *Ind. Acc. Comm.*, 21 Cal. 2d 461, 132 P. 2d 815; *State Highway Commission* v. *Saylor*, 252 Ky. 743, 68 S. W. 2d 26; *W. C. Sharp Drug Stores* v. *Hansard*, 144 S. W. 2d 777 (Tenn.)); or in the vehicle of an independent contractor (*Liberty Mutual Insurance Co.* v. *Gray*, 137 F. 2d 926 (C. C. A. 9); *American Coal Mining Co.* v. *Crenshaw*, 77 Ind. App. 684, 133 N. E. 394; *Central Construction Co.* v. *Harrison*, 137 Md. 256, 112 Atl. 627. Contra: *St. Helens Colliery Co.* v. *Hewitson*, [1924] A. C. 59; but cf. *Weaver* v. *Tredegar Iron & Coal Co.*, [1940] A. C. 955); or in the vehicle of a fellow employee (*Swanson* v. *Latham & Crane*, 92 Conn. 87, 101 Atl. 492; *Konopka* v. *Jackson Co. Road Comm.*, 270 Mich. 174, 258 N. W. 429); (3) where the employee is subject to emergency call at all times—*Reisinger-Siehler Co.* v. *Perry*, 165 Md. 191, 167 Atl. 51; (4) where the employee is on a "special mission" for the employer—*Gagnebin* v. *Ind. Acc. Comm.*, 146 Cal. App. 80, 34 P. 2d 1052; *Keely* v. *Metropolitan Edison Co.*, 41 A. 2d

Section 21 of the Act specifically provides that a compensation order can be set aside only "if not in acordance with law" (Appendix, p. 38).

Notwithstanding the admonition in the *Voehl* case (288 U. S. at 169) that "No exact formula can be laid down which will automatically solve every case," the court below ruled as a matter of law that, as an indispensable condition precedent to liability for compensation in a "transportation" case, the employer must have "control" over the "acts and movements" of the employee during the transportation (R. 62). On this point the decision below is squarely in conflict with the *Voehl* case, since the employee there

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420 (Pa. Super.); or (5) where the employee's compensation covers travel time—*McKinney* v. *Darlac*, 48 N. M. 149, 146 P. 2d 867; *Exelbert* v. *Klein & Kavanaugh*, 278 N. Y. S. 377, 243 App. Div. 839; *Western Pipe and Steel Co.* v. *Ind. Acc. Comm.*, 49 Cal. App. 2d 108, 121 P. 2d 35. In other "transportation" situations, there is divergence in the authorities, only some sustaining compensation awards (a) where the employer does not undertake to supply transportation but simply bears the cost thereof (see cases cited *infra*, pp. 18–19); (b) where the employer furnishes a free pass on its own public vehicles (*Ridermacher* v. *St. Paul City Ry. Co.*, 8 N. W. 2d 460 (Minn.); *DeCamp* v. *Youngstown Municipal Ry. Co.*, 140 Ohio St. 376, 144 N. E. 128; *City and County of San Francisco* v. *Industrial Accident Comm.*, 61 Cal. App. 2d 248, 142 P. 2d 760; *Miceli* v. *Erie Railroad Co.*, 131 N. J. L. 427, 37 A. 2d 123; contra: *Kowalek* v. *New York Consolidated R. Co.*, 229 N. Y. 489, 128 N. E. 888; *Tallan* v. *Interborough Rapid Transit Co.*, 232 N. Y. 410, 134 N. E. 327); or (c) where the employee has no fixed work site and moves around from job to job (see cases cited *infra*, note 14, pp. 30–31).

was driving his own automobile and the employer in fact had no control over "his acts and movements." The opinion in the *Vochl* case contains not the slightest suggestion of a rule of law making "control" by the employer an essential condition for finding an injury to have arisen out of and in the course of employment.

The court below seemed to believe that control is necessary in order to establish a "causal connection" between the injury and the employment (R. 61). Cf. *Cudahy Packing Co.* v. *Parramore*, 263 U. S. 418. But, as the *Vochl* case shows, there may be an agreement between the employer and the employee "by which the service may be taken to begin earlier or elsewhere" than at the work site, so that "the hazards of the journey may properly be regarded as the hazards of the service" (288 U. S. at pp. 169–170). The mere fact that at the moment of the injury, during the journey to or from the work site, the employee is not actually doing the work he is primarily hired to do, or that his acts and movements are not subject to the employer's control, does not render him any less in the service of his employer. Cf. *Nierotko* v. *Social Security Board*, 327 U. S. 358. It is sufficient if he is engaged in an activity incidental to his employment. *Liberty Mutual Insurance Co.* v. *Gray*, 137 F. 2d 926 (C. C. A. 9); *Ward* v. *Cardillo*, 135 F. 2d 260, 264 (App. D. C.); *Swanson* v. *Latham & Crane*, 92 Conn. 87, 101 Atl. 492.

The "control" test is not only at variance with the *Vochl* decision but its inadequacy is demonstrated by the many types of cases in which compensation is awarded even though the employer lacks "control." Injuries to "outside" employees, such as travelling salesmen, solicitors and policemen, while using the highway, are uniformly recognized as compensable. *Bennett* v. *Marine Works, Inc.*, 273 N. Y. 429, 7 N. E. 2d 847. Yet, in many such cases, the employer manifestly has no real or substantial control over either the employee's movements or his means of transportation. The same is true of cases in which an employee is injured on the highway while upon a "special mission" for his employer (*Gagnebin* v. *Ind. Acc. Comm.*, 140 Cal. App. 80, 34 P. 2d 1052; *Keely* v. *Metropolitan Edison Co.*, 41 A. 2d 420 (Pa. Super.)); or where the employee is being paid for travel time while going to or from work (*McKinney* v. *Dorlac*, 48 N. M. 149, 146 P. 2d 867; *Exelbert* v. *Klein & Kavanaugh*, 278 N. Y. S. 377, 243 App. Div. 839; *Western Pipe and Steel Co.* v. *Ind. Acc. Comm.*, 49 Cal. App. 2d 108, 121 P. 2d 35); or where the employee is injured shortly after boarding or leaving a vehicle supplied by the employer (*Ward* v. *Cardillo*, 135 F. 2d 260, and cases cited); or where the employee is injured in a traffic accident while approaching or departing from the premises of the employer (*Cudahy Packing*

Co. v. *Parramore,* 263 U. S. 418; *Weaver* v. *Tredegar Iron & Coal Co.,* [1940] A. C. 955).[5] In all of these situations, compensation is generally allowed even though control by the employer is, for all practical purposes, entirely absent.

If the control test is applied in transportation cases of this sort, it will often cause compensation to turn, not upon the nature of the employment, but upon such irrelevant considerations as whose vehicle the employee was riding in at the time of the injury. For example, in those cases where the employer bears the cost of transportation to and from work, the injury to the employee may occur while he is travelling (1) in his own vehicle; (2) in the vehicle of a fellow employee (who may or may not have made arrangements with the employer for such transportation); (3) in the employer's vehicle (with or without the driver being supplied by the employer); (4) in the vehicle of an independent contractor hired by the employer; or (5) in the vehicle of a common carrier.

[5] Apparently recognizing the difficulty of applying the "control" test to the situation presented in the *Cudahy* case, *supra*, the court below suggested that there "the employer's control * * * is implied" (R. 61–62). But in the *Cudahy* case, the injury to the employee occurred while he was driving to work on a public highway in the automobile of a fellow employee, and the employer certainly had no control over the employee or the vehicle in which he was riding. Thus, resort by the court below to the notion of "implied control" serves only to emphasize the unworkability of the "control" test.

Which of these situations would be excluded from compensation by applying the "control" test would, of course, depend upon how far one carries the notion of "control" to its logical conclusion. But it is clear that in at least some of these cases compensation would automatically be barred by the test.

Any such difference in treatment can find no support in the realities of workmen's compensation, or in the statutory policy of protecting workmen from those hazards which, as a practical matter, are incidental to their employment. It may well be that the mode of transportation in a particular case may illumine the nature of the employment agreement. But if in such a case it is concluded that the hazards of employment extend to transportation to and from work, so that "service shall commence when the employee leaves his home on the duty assigned to him and shall continue until his return" (*Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162, 170), the particular type of vehicle involved should in no way affect the compensability of the injury. No one would deny that the traveling salesman is entitled to receive the protection of workmen's compensation from the hazards of travel, whether his journey be in his own car, a common carrier or any other reasonable mode of transportation. The same should be true of any other type of employee

so long as the hazards of his employment extend to transportation to and from work.[6]

These considerations emphasize the undesirability of importing into the law of workmen's compensation the common-law rules of agency, and more particularly the so-called "control" test. The latter is at best a vague and indefinite standard which, if applied to the field of workmen's compensation, would inevitably introduce the same uncertainties that have long plagued the courts in dealing with the doctrine of *respondeat superior*, and would depart from the statutory policy of providing a "prompt" and "inexpensive" method for dealing with workmen's compensation claims. *Crowell* v. *Benson*, 285 U. S. 22, 45–47. As this Court pointed out in *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 120–121, 125, the "so-called 'control test' with which common-law judges have wrestled to secure precise and ready applications", has a simplicity which is "illusory"; few "problems in the law have given greater variety of application and conflict in results"; and to "import wholesale the traditional common-law conceptions or some distilled essence of their local variations as exclusively controlling limitations upon the scope of the statute's effective-

[6] Several states have by statute sought to deal with the going and coming problem. See Dodd, *Administration of Workmen's Compensation*, p. 684.

ness," would cause the administration of the statute to "become encumbered by the same sort of technical legal refinement as has characterized the long evolution of the employee-independent contractor dichotomy in the courts." The same would be true if the "control" test were imported wholesale into the Longshoremen's Act. Cf. *Hust* v. *Moore-McCormack Lines*, No. 625, last Term, decided June 10, 1945, slip opinion, pp. 12–13; *International Association of Machinists* v. *Labor Board*, 311 U. S. 72, 80.

It is true, as the respondents point out, that some state authorities seem to use the "control" test in "transportation" cases.[7] But it is noteworthy that in such jurisdictions only lip service

[7] *Guenesa* v. *Rulon, Inc.*, 124 Pa. Super. 569, 189 Atl. 524 (carfare); *Orsinie* v. *Torrance*, 96 Con. 352, 113 Atl. 924 (carfare); *Whitney* v. *Hazard Lead Works*, 105 Conn. 512, 136 Atl. 105 (injury on streetcar, employer paying monthly sum for maintenance of employee's automobile); *Republic Underwriters* v. *Terrell*, 126 S. W. 2d 752 (Tex. Civ. App.) (gasoline for employee's automobile); *Public Service Co. of No. Ill.* v. *Industrial Comm.*, 370 Ill. 334, 18 N. E. 2d 914 (allowance of 67 cents a day to cover cost of transportation; employees alternated in use of own automobiles); *Kerin* v. *Industrial Comm.*, 239 Wis. 617, 2 N. W. 2d 223 ($1.50 daily allowance for use of employee's automobile); *Baumbach* v. *Industrial Comm. of Ohio*, 59 Oh. App. 101, 17 N. E. 2d 389 (used own automobile, employer paying equivalent of bus fare); *Industrial Comm. of Ohio* v. *Heil*, 123 Ohio St. 604, 176 N. E. 458 (weekly allowance for transportation expense; employee used taxicab).

is sometimes paid to the doctrine;[8] and where, as here, there is an express agreement to provide transportation, the doctrine appears to be without force.[9] In other jurisdictions, the "control" test is completely rejected.[10] For the reasons already stated, we submit that the view taken in the latter jurisdictions is the sound one. And, if it is applied here, it will be in harmony with the principle that the District of Columbia Workmen's Compensation Act is to be liberally construed.[11] Of course,

[8] *Calif. Cas. Indem. Exch.* v. *Industrial Acc. Comm.*, 21 Cal. 2d 461, 132 P. 2d 815; *Konopka* v. *Jackson Co. Road Comm.*, 270 Mich. 174, 258 N. W. 429.

[9] *Swanson* v. *Latham & Crane*, 92 Conn. 87, 101 Atl. 492; *Littlefield's Case*, 126 Me. 159, 136 Atl. 724; *see Kerin* v. *Industrial Comm.*, 239 Wis. 617, 2 N. W. 2d 223; *Kowalek* v. *New York Consol. R. Co.*, 229 N. Y. 489, 128 N. E. 888.

[10] *Lehigh Nav. Coal Co.* v. *McGonnell*, 120 N.J.L. 428, 199 Atl. 906 (cost of railroad commutation tickets); *Williams* v. *Trav. Ins. Co. of Hartford, Conn.*, 19 So. 2d 586 (La.) travelling expenses, employee using own automobile); *Turner, Day & Woolworth Handle Co.* v. *Pennington*, 250 Ky. 433, 63 S. W. 2d 490 (gas and oil for employee's automobile); see *Breland* v. *Traylor Engineering & Mfg. Co.*, 52 Cal. App. 2d 415, 126 P. 2d 455 (transportation allowance per mile, employee using own automobile); *Cary* v. *State Industrial Comm.*, 147 Okla. 162, 296 Pac. 385 (allowance for transportation expenses where work site was over 8 miles away); *Burchfield* v. *Department of Labor and Industries*, 4 P. 2d 858 (transportation allowance equal to bus fare; employee used own automobile).

[11] *Baltimore and Philadelphia Steamboat Co.* v. *Norton*, 284 U. S. 408; *Fidelity and Casualty Co. of New York* v. *Burris*, 59 F. 2d 1042 (App. D. C.); *Associated General Contractors of America, Inc.* v. *Cardillo*, 106 F. 2d 327 (App. D. C.); *DeWald* v. *Baltimore & Ohio R. R. Co.*, 71 F. 2d 8[illegible] (C. C. A. 4), certiorari denied, 293 U. S. 581.

the presence or absence of "control" may be a relevant factor, to be considered along with all the other circumstances, in determining whether the injury arose "out of and in the course of employment." But it is the Deputy Commissioner who is charged by the Act with the duty of weighing all of the relevant factors in determining whether the injury occurred while the employee was engaged in an activity so intimately related to the employment that "the hazards of the journey may properly be regarded as hazards of the service" (*Voehl*, 288 U. S. at 170). "Considerations of proximity and degree are here, as so often in the law, decisive." *Freeman* v. *Hewit*, No. 3, this Term, decided December 16, 1946, slip opinion, p. 5. This Court has not undertaken to prescribe rules of law specifying the weight which must be given to any particular factor; and the Deputy Commissioner's conclusion should not be set aside if it has a reasonable basis in the record and is not at variance with established legal criteria.

B. THERE WAS AMPLE WARRANT IN THE RECORD FOR THE DEPUTY COMMISSIONER'S FINDING

There was ample evidence before the Deputy Commissioner to support his finding (R. 9) that Tiger's injury arose out of and in the course of his employment. From the general circumstances surrounding the employment, and the terms of the employment contract itself, there was sufficient basis for concluding, for purposes of workmen's compensation, that the transporta-

tion to and from work was an incident of the employment, and that Ticer's "service" commenced when he left his home and continued until his return.

1. The terms of the employment were governed by a long-standing agreement between Local Union No. 26, International Brotherhood of Electrical Workers (of which Ticer was a member) and the Institute of Electrical Contractors of the District of Columbia, Inc. (of which the employer was a member) (R. 52). The agreement expressly provided that "Transportation and any necessary expense such as board and lodging shall be furnished for all work outside the District of Columbia" (R. 53). This provision had been in the basic contract between the Union and the Institute for some fifteen years (R. 23–24). During this extended period, the manner in which the employer carried out this obligation varied with the circumstances surrounding the particular work project to which the employees were assigned. At times, the employer actually furnished the means of transportation, using its own cars and a station wagon (R. 31, 33). At other times, in lieu of supplying the transportation facilities, the employer paid the employees a money allowance to cover the cost of transportation (R. 17–18, 24). Where the latter course was followed, the written contract was not amended or changed in respect of the provisions governing transportation. The employer would

simply communicate with the Union to ascertain the amount necessary to defray the cost of transportation. (R. 24, 31.) The amount agreed upon affected all contractors in the local Institute, and bids of all employers were made after the cost of transportation had been ascertained (R. 22, 24, 31). With respect to the work at Quantico, $2.00 per day had been agreed upon as the transportation allowance (R. 20, 23). This amount was fixed after investigation into the cost of transportation by railroad (R. 22), and was paid to each employee, irrespective of his rate of pay (R. 39, 40), to cover the cost of daily transportation to and from Quantico (R. 30, 31, 34, 36, 38, 39).

The court below, apparently making its own findings of fact, held that the original agreement to furnish transportation "was not followed by the parties with respect to the work at Quantico" and that a "new" oral contract to pay the transportation expenses supplanted the written agreement (R. 61). There is no evidence in the record that, when the parties arranged for the payment of transportation expenses rather than the furnishing of actual transportation, they understood that they were entering into a new contract or amending the old one; and it is indeed difficult to discover the basis for the conclusion of the court below in this regard. Certainly the record

compelled no such conclusion, for it is reasonable to infer, as the Deputy Commissioner apparently did, that the arrangement for paying the employees $2.00 per day for transportation was merely an implementation of the agreement to furnish transportation. As already noted, the transportation provision in the contract between the Union and the Employer's Institute had been in effect for approximately fifteen years, and under that provision, the employers sometimes supplied the cost of transportation and at other times supplied the vehicle, depending upon the particular work project. Although other changes were made in the contract when it was renewed from year to year, no change was made in the transportation provision (R. 23). From this evidence, it is certainly reasonable to infer that, over the fifteen-year period in which the contract was in effect, the payment of the transportation expense was not a mere substitution of or variation from the contract, but was the carrying out of the contract itself; otherwise, the written contract provision undoubtedly would have been changed to accord with the substitute.

2. Aside from the express obligation to furnish transportation, the exigencies of the employment were such, by reason of the location of the work, the hours of work, and the inadequacy of public transportation facilities, as to require as a practical

matter that the employer make some arrangement for transportation if employes were to be obtained for the job. The employees generally worked from 7:30 a. m. until 4:30 p. m. (R. 40). Although there was train and bus service to a place called Triangle near Quantico, there was no such service to Quantico proper (R. 38, 39), and, in order to use public transportation, it would have been necessary for employees to arise at four o'clock in the morning (R. 27, 28), and then walk two to four miles at the Quantico end (R. 39). No public transportation to the job site was available (R. 38). Finally, the need for skilled men at Quantico was such that apparently the contractors would, if necessary, have paid Ticer $5.00 for daily transportation to get him to work (R. 27, 28). The transportation was obviously more than the normal travel of a worker from his home to his place of employment in the same locality. It was only such unusual transportation—outside the locality—for which the employer was required by the contract to pay.

3. Other conditions peculiar to the work at Quantico and Ticer's general employment relationship with the Ernst Company further demonstrate that his transportation to and from work was so closely related to his employment as fairly to be regarded, for purposes of workmen's compensation, as incidental to his employment. For

unlike any ordinary factory or office worker who has a fixed place of work, Ticer was akin to an "outside" worker who travels to different work sites. When first hired by the Ernst Company, some nine years before his injury,[12] Ticer was not hired to work on any particular project; he worked wherever he was needed on any of the employer's jobs (R. 30; Tr. 127).[13] When he was transferred from one job to another, the employer did not have to rehire him (R. 32). Thus upon his transfer to Quantico in November 1940, from a project in the District of Columbia (R. 35), there was no lapse in his employment and no necessity for a new contract of employment (R. 34, 36). At that time, the employer was engaged in some nine different projects at the Marine Base, the jobs being located at widely separated points on the post (Tr. 44–45, 66). Ticer worked on most of these jobs, and whenever he was shifted from one to the other, transportation was provided in the employer's truck (Tr. 66). The employer also had projects going on

[12] Ticer was regularly employed and had worked steadily for the Ernst Company for approximately nine years prior to his injury, except for a period of approximately six months in the year 1938 or 1939, when he went to work for the Federal Government (R. 8).

[13] As used in this brief, R. refers to the printed record; Tr. refers to the unprinted transcript of testimony on file in the Clerk's office, and, by stipulation of the parties, part of the record here (R. 65).

in the District of Columbia (Tr. 44; R. 33), so that while Ticer worked some three years at Quantico before his injury, he was at all times subject to being ordered to return for work in the District (R. 51; Tr. 107, 127). Indeed, at the time of his injury, one of the passengers in his car was a fellow employee who previously had been transferred from Quantico to Washington, for a few days (R. 46–47, 51). In this aspect of the employment, Ticer was an "outside" employee, hired to work at shifting work sites, so that his employment could be construed as extending not merely to the period spent at a particular work site, but also to the period spent in travelling to and from work.[14]

[14] Cf. *Williams* v. *Trav. Ins. Co. of Hartford, Conn.*, 19 So. 2d 586 (La.) (pine lumber inspector working at different places; used own automobile); *Turner, Day & Woolworth Handle Co.* v. *Pennington*, 250 Ky. 433, 63 S. W. 2d 490 (member of crew to fell timber at different sites; used own automobile); *Hohman* v. *George H. Soffel Co.*, 354 Pa. 31, 46 A. 2d 475 (foreman plumber with no fixed work site; used own automobile, employer paying expenses); *O. P. Skaggs Co.* v. *Nixon*, 101 Colo. 203, 72 P. 2d 1102 (attorney—executive, occasionally called to another city for consultation; used own automobile); *Burchfield* v. *Department of Labor & Industries*, 4 P. 2d 858 (Wash.) (stevedore working at different ports—used own automobile, employer paying an allowance equal to bus fare); *McKinney* v. *Dorlac*, 48 N. M. 149, 146 P. 2d 867 (plasterer, using own automobile, sent to job in another city; and employer paid for travel time; *Bennett* v. *Marine Works, Inc.*, 273 N. Y. 429, 7 N. E. 2d 847 (salesman and repairs supervisor who visited ships at docks in different cities and used rail transportation).

In the light of the employer's express obligation to furnish transportation, and in view of the nature and circumstances of Ticer's employment by the Ernst Company and his work at Quantico, we submit that the evidence abundantly justified the inference that Ticer's transportation to and from work was an incident of his employment, and that he was in the service of his employer while going to and from work. The Deputy Commissioner, therefore, was warranted in concluding that Ticer's injury, although occurring while on his way home from work, arose out of and in the course of his employment. Even if "more than one possible conclusion could have been reached upon the evidence, we think it was clearly sufficient to support the Deputy Commissioner's finding that [Ticer] was acting in the course of his employment." *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 246.

II

THE DEPUTY COMMISSIONER PROPERLY FOUND THAT HE HAD JURISDICTION TO MAKE THE AWARD

In the courts below and before the Deputy Commissioner, the insurance carrier and the employer contended that, in view of the length of time Ticer worked in Virginia, and the occurrence of his injury there, the Deputy Commissioner was without jurisdiction to make the award (R.

4–5, 60, 13–13). The Deputy Commissioner, however, found that he had jurisdiction (R. 9), and was sustained in this regard by the district court (R. 12–13). The court below did not find it necessary to pass upon this question, since it disposed of the case on the ground that Ticer's injury did not arise out of and in the course of his employment.

In our view, the Deputy Commissioner's finding that he had jurisdiction was so clearly correct that it requires only summary treatment here. Like any other administrative finding, it should be accepted as final if supported by the evidence and in accordance with law. The Deputy Commissioner followed the plain command of the statute that it "shall apply in respect to the injury or death of an employee of an employer in the District of Columbia, *irrespective of the place where the injury or death occurs* * * *"[15] (Italics supplied; Appendix, *infra*, p. 37). Since Ticer was admittedly an employee of an employer in the District of Columbia, the statute plainly applies here.

In the court below, the employer and insurance carrier contended that where the injury to the employee occurs outside the District of Columbia, the District of Columbia Workmen's Compensa-

[15] The italicized clause, *supra*, was not in the original bill, but was added by the Senate Committee on the District of Columbia. S. Rep. No. 852 (70th Cong., 1st sess.), p. 1. The clause was not discussed in the Committee Reports or the debates.

tion Law can apply only if the "employee during the whole of the employment spent more time working within the District than he spent working outside of the District." The record, however, does not show that Ticer spent more time working outside the District than within the District.[16] But even if it did, that should not bar jurisdiction under the Act. To do so would require reading into the unequivocal language of the statute a qualification that has no basis in its legislative history. The result of any such limitation would be in conflict with the principle that the Act is to be given a liberal construction. *Baltimore and Philadelphia Steamboat Co.* v. *Norton*, 284 U. S. 408; *Fidelity and Casualty Co. of New York* v. *Burris*, 59 F. 2d 1042 (App. D. C.); *Associated General Contractors of America, Inc.* v. *Cardillo*, 106 F. 2d 327 (App. D. C.); *DeWald* v. *Baltimore & Ohio R. R. Co.*, 71 F. 2d 810 (C. C. A. 4), certiorari denied, 293 U. S. 581. It was undoubtedly for such reasons that the court below has, in effect, declined in other cases to read into the statute the limitation sought here by the employer and insurance carrier. *B. F. Goodrich Co.* v. *Britton*, 139 F.

[16] For approximately three years prior to his injury, Ticer worked on his assignment in Quantico (R. 8–9). But he had been employed by the Ernst Company for approximately nine years prior to his injury (with the exception of a period of approximately six months, in the year 1938 or 1939), and during such entire period of employment he worked on projects in and around the District of Columbia (R. 7–8, 16, 32).

2d 362, 364 (App. D. C.); *Travelers Insurance Co.* v. *Cardillo and Beard*, 141 F. 2d 362 (App. D. C.); *Travelers Insurance Co.* v. *Cardillo and Lawrence*, 141 F. 2d 364 (App. D. C.).

Obviously, the extraterritorial provision in the statute is designed to cope with the special circumstances involved in providing adequate workmen's compensation for the District of Columbia. Since the District is essentially a city-state, it is inevitable that many workmen employed in the District by employers carrying on businesses here will have assignments in areas outside the geographical limits of the District. There is no reason why such workmen, when injured on an assignment outside the city, should be denied a remedy within the District, where their substantial business connections are located.

The application of the extraterritorial provision here raises no problem of due process or full faith and credit. It is well established that so long as a State has a legitimate interest in a given employment relationship, it may award compensation under its own law for an extraterritorial injury, although there may be another remedy elsewhere. Thus, in *Alaska Packers Association* v. *Industrial Commission*, 294 U. S. 532, an award of compensation under the California law, to a non-resident alien, for an injury in Alaska, was sustained by this Court, notwith-

standing that the only contact with California was that the contract of employment had been made in California, even though the entire work under the contract was to be performed outside California. Cf. *Pacific Employers Insurance Co.* v. *Industrial Acc. Commission*, 306 U. S. 493; *Bradford Electric Light Company, Inc.* v. *Clapper*, 286 U. S. 145. In the present case, the District of Columbia had a far more substantial interest in Ticer's employment. Ticer and his wife were residents of the District (R. 8–9); Ticer was hired in the District (R. 8); the employer had its place of business in the District and engaged in construction work in the District (R. 7); before the Quantico assignment, Ticer worked in the District (R. 8); while at Quantico, he was subject to orders from the District and subject to being transferred to the District (R. 51; Tr. 107, 127); he was transferred from Washington to Quantico without either loss of time or any new contract of employment (R. 34, 36); his pay was carried to him from the District or else paid to him in the District (R. 38); and he commuted between the District and Quantico (R. 8–9). In these circumstances, there can be no doubt that the District had a sufficient interest to make the award here; and the Deputy Commissioner's finding that he had jurisdiction was clearly correct.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed and the cause remanded with directions that the judgment of the District Court be affirmed.

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APPENDIX

1. The Act of May 17, 1928 (District of Columbia Workmen's Compensation Law) (c. 612, 45 Stat. 600, D. C. Code, 1940, Title 36, c. 5, § 1) provides in part:

> SEC. 1.—The provisions of the Act entitled "Longshoremen's and Harbor Workers' Compensation Act," approved March 4, 1927, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

2. The Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. 1424, 33 U. S. C. 901 *et seq.*) provides in part:

> SEC. 2. DEFINITIONS.—When used in this Act—
>
> * * * * * *
>
> (2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the

willful act of a third person directed against an employee because of his employment.

* * * * *

SEC. 3. COVERAGE—(a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

* * * * *

SEC. 19. (a) Subject to the provisions of

SEC. 20. PRESUMPTIONS.—In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this Act.

* * * * *

* * * * *

SEC. 21. REVIEW OF COMPENSATION ORDERS—

* * * * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). * * *

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